

FUNDAMENTAL ERROR REPORTER

©2012 by Crane McClennen

Rule 31.13(c) Appellate briefs—Contents—Fundamental error.

31.13.c.fe.030 If the defendant **did not** object at trial, the appellate court will review only for **fundamental error**, and **will grant** relief if the defendant proves fundamental, prejudicial error.

State v. Trujillo, 227 Ariz. 314, 257 P.3d 1194, ¶¶ 9–21 (Ct. App. 2011) (defendant contended trial court erred in considering his lack of remorse or unwillingness to admit guilt as an aggravating circumstance; because defendant did not object at trial, court reviewed for fundamental error only; court held trial court may not consider defendant’s lack of remorse or unwillingness to admit guilt as aggravating circumstance; court noted trial court stated “no less than five times that Trujillo had either denied responsibility for the crime or that he had shown no remorse for his conduct,” and thus found prejudicial fundamental error).

State v. Bunting, 226 Ariz. 572, 250 P.3d 1201, ¶¶ 5–12 (Ct. App. 2011) (defendant disclosed defense of guilty but insane; defendant executed waiver of jury trial (*Avila* #1); trial court determined guilt on basis of police reports; trial court found defendant failed to establish she was insane; court held trial court failed to advise defendant it would determine guilt on stipulated record (*Avila* #2) (court did not mention *Avila* ##3–6), held fundamental error, and remanded for an evidentiary hearing “to determine whether Bunting would have agreed to submit her case to the judge if a proper colloquy had been conducted”).

31.13.c.fe.050 If the defendant **did not** object at trial to a **trial procedure**, the appellate court will review only for **fundamental error**, and **will not grant** relief if the defendant fails to prove fundamental, prejudicial error.

State v. Manuel, ___ Ariz. ___, ___ P.3d ___, ¶¶ 28–32 (Dec. 21, 2011) (prosecutor cross-examined defense mitigation expert about how much he had received from testifying for defendants in capital cases; court held it was not improper to question witness about compensation received, but it was improper to intimate witness reached conclusions merely for pecuniary gain; because defendant did not object, court reviewed for fundamental error only, and concluded defendant had not shown prejudice sufficient to constitute fundamental error).

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 7–9 (2011) (because defendant did not object at trial that his waiver of his right to attend the proceedings was involuntary, court reviewed for fundamental error only, and found no error, fundamental or otherwise).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 6–11 (2011) (defendant contended prosecutor engaged in misconduct in offering evidence of defendant’s prior conviction for sexual assault because prosecutor knew he could not prove victim’s sexual intercourse prior to her death was sexual assault, thus prior conviction for sexual assault would not prove defendant had aberrant sexual propensity to commit crime charged; because defendant made no claim of prosecutorial misconduct below, court reviewed for fundamental error only; court noted there was ample evidence victim had been raped: victim left bar at 12:30 a.m., and was found dead 90 minutes later, with a belt wrapped tightly around her neck; defendant’s semen was found on victim’s underpants and in her vagina; victim had no known previous acquaintance with defendant; she had indentations on wrist, indicating she had been restrained; and her clothing was disheveled and she had urinated in her bed).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 26–29 (2011) (trial court ordered defendant to wear stun belt; because defendant did not object at trial to wearing of stun belt, court reviewed for fundamental error only; because defendant failed to establish jurors actually saw stun belt, court held defendant failed to show trial court erred).

State v. Prince, 226 Ariz. 516, 250 P.3d 1145, ¶¶ 84–87 (2011) (defendant shot victim in jaw; defendant contended prosecutor erred in asking victim about her medical condition; because defendant never objected or moved for mistrial, court reviewed for fundamental error only; court held initial questions about victim’s health were proper because they related to victim’s ability to recall events and to testify about them, and held defendant’s claim that other questions caused jurors to speculate about aggravating circumstances was speculative).

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 6–12 (2011) (because state sought death penalty, trial court erred in not appointing expert to conduct evaluation; because defendant did not object at trial, court reviewed for fundamental error only, and concluded defendant failed to establish prejudice).

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 28–34 (2011) (trial court ordered mental examination; defendant contended trial court erred in not appointing two experts; because defendant did not object at trial, court reviewed for fundamental error only; court concluded defendant failed to establish prejudice).

State v. Broman, 228 Ariz. 302, 265 P.3d 1101, ¶¶ 8–9 (Ct. App. 2011) (state filed petition to revoke defendant’s probation alleging in single count defendant had “unlawfully possess[ed] child pornography (10 counts),” and state introduced over 40 images of child pornography found on defendant’s computer; on appeal, defendant contended he was deprived of notice essential to preparation of his defense; because defendant failed to object at trial, court reviewed for fundamental error only; because defendant’s defense was someone else put images on his computer, number of images found on defendant’s computer did not affect that defense, thus no prejudice).

31.13.c.fe.060 If the defendant **did not** object at trial to the admission or exclusion of **evidence**, the appellate court will review only for **fundamental error**, and **will not grant** relief if the defendant fails to prove fundamental, prejudicial error.

State v. Prince, 226 Ariz. 516, 250 P.3d 1145, ¶¶ 41–43 (2011) (issue of defendant’s guilt was determined by one jury, and issue of sentence was determined by another jury; at aggravation phase, state had read to jurors transcript of testimony state’s gun expert gave at guilt phase; defendant contended this violated his right of confrontation; because defendant did not object at trial, court reviewed for fundamental error only, and held defendant failed to prove prejudice because testimony had no bearing on (F)(9) aggravating circumstance (age of victim and age of defendant), and did not go to core (F)(6) issue (whether victim consciously suffered physical pain or mental anguish)).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶ 45 n.26 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding as evidence that co-defendant dentist’s friend’s husband, D.H., murdered victim, that D.H. asked co-worker if she would ever kill for money; on appeal, defendant contended statement was admissible because it had non-hearsay purpose; because defendant did not make that argument below and did not argue on appeal that any error was fundamental, court did not address that argument on appeal).

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 26–27 (Ct. App. 2011) (defendant claimed victim’s immigration status would be in jeopardy if he had been aggressor, thus evidence of victim’s immigration was relevant; defendant contended trial court violated his due process rights by excluding that evidence; because defendant raised that claim for first time on appeal, court reviewed for fundamental error only and found no error).

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 31–32 (Ct. App. 2011) (defendant contended trial court’s ruling precluding him from testifying about being tortured as child violated his constitutional right to present defense; because defendant raised that claim for first time on appeal, court reviewed for fundamental error only and found no error).

31.13.c.fe.070 If the defendant **did not** object at trial to the giving or the refusal to give a **jury instruction**, the appellate court will review only for **fundamental error**, and **will not** grant relief if the defendant fails to prove fundamental, prejudicial error.

State v. Kemper, ___ Ariz. ___, ___ P.3d ___, ¶¶ 2–6 (Ct. App. Nov. 1, 2011) (defendant contended trial court’s failure to instruct jurors that defendant’s knowledge of victim’s non-consent was element state was required to prove; because defendant did not object at trial, court reviewed for fundamental error only; because victim’s non-consent, and defendant’s knowledge of victim’s non-consent, is element of sexual assault, court held trial court erred in not so instructing jurors, and that error prejudiced defendant).

State v. Smith, 228 Ariz. 126, 263 P.3d 675, ¶¶ 9–10 (Ct. App. 2011) (on appeal, defendant contended jury instruction was erroneous because it “blended the question whether Smith was under the influence with the question whether he was impaired to the slightest degree,” thereby “eliminat[ing] the possibility that Smith could have been under the influence while driving, but not impaired to the slightest degree”; because defendant did not object at trial, court reviewed for fundamental error only; court stated, “Novel assignments of error in this context seldom warrant relief, particularly when the argument urged on appeal is primarily of academic interest.”).

State v. Sprang, 227 Ariz. 10, 251 P.3d 389, ¶ 4 (Ct. App. 2011) (defendant was charged with first-degree murder; defendant contended that, because state did not request second-degree murder instruction, trial court should not have given one; because defendant did not make that argument below, court reviewed for fundamental error only).

31.13.c.fe.080 If the defendant **did not** object to the trial court about the **sentence** or the **sentencing procedure**, including the validity of any prior conviction alleged, the defendant waives any error on appeal, and the appellate court may review the claim only for **fundamental error**.

State v. Martinez, 226 Ariz. 221, 245 P.3d 906, ¶17 (Ct. App. 2011) (defendant contended he could not receive consecutive sentences for manufacturing dangerous drugs and possession of dangerous drugs for sale; because defendant did not object at trial, court reviewed for fundamental error; court concluded that defendant could receive consecutive sentences).

31.13.c.fe.090 The imposition of an illegal sentence is fundamental error.

State v. Siplivy, 228 Ariz. 305, 265 P.3d 1104, ¶ 5 (Ct. App. 2011) (defendant was convicted of transportation of methamphetamine for sale, two counts of possession of narcotic drug, possession of marijuana, and five counts of possession of drug paraphernalia, two of which involved methamphetamine; trial court sentenced defendant to consecutive and concurrent

prison terms totaling 12½ years; defendant's attorney filed *Anders* brief, so court reviewed for fundamental error; court held that, when a defendant is convicted of drug offense not involving methamphetamine, but is also convicted of drug offense involving methamphetamine, probation is not available for any drug offenses, and trial court must sentence defendant to prison on all offenses).

State v. Kasic, 228 Ariz. 228, 265 P.3d 410, ¶ 15 (Ct. App. 2011) (defendant committed four arsons while juvenile, and four more arsons once he was adult; trial court imposed consecutive sentences totaling 139¾ years, 80½ years of which were for offenses defendant committed while juvenile; defendant contended that, because part of 139¾ year sentence was for offenses he committed while juvenile, sentence of 139¾ years was cruel and unusual punishment; because defendant did not raise this objection at trial, court reviewed for fundamental error only; court held sentence was not cruel and unusual punishment).

State v. Martinez, 226 Ariz. 221, 245 P.3d 906, ¶ 17 (Ct. App. 2011) (defendant contended he could not receive consecutive sentences for manufacturing dangerous drugs and possession of dangerous drugs for sale; because defendant did not object at trial, court reviewed for fundamental error; court concluded that defendant could receive consecutive sentences).

31.13.c.fe.120 Waiver applies only if the party had the opportunity to present the claim to the trial court but did not do so; if the claim is one that the party was not able to present to the trial court because of the nature of the proceedings, the party will not be considered to have waived the issue.

State v. Vermuele, 226 Ariz. 399, 249 P.3d 1099, ¶¶ 5–14 (Ct. App. 2011) (on appeal, defendant contended trial court erred in not considering certain mitigating circumstances; state contended defendant waived that claim by not presenting it to the trial court; court held that, because of way sentencing proceeded, it was not possible to make that claim with trial court, thus defendant did not waive issue).

31.13.c.fe.130 When the appellant submits an *Anders* brief with no issues stated, the appellate court reviews the record for fundamental error.

State v. Flores, ___ Ariz. ___, 260 P.3d 309, ¶ 12 (Ct. App. 2011) (court stated, “Since this is an *Anders* appeal, no issues were preserved, so this Court has reviewed the entire record for fundamental error.”).

Rule 31.13(c) Appellate briefs—Contents—Harmless error.

31.13.c.he.010 When a defendant **did** object at trial and thereby preserved an issue for appeal, if the appellate court concludes there was error, the court **will reverse** unless the state proves beyond a reasonable doubt the error did not contribute to or affect the verdict or sentence.

Bashir v. Pineda, 226 Ariz. 351, 248 P.3d 199, ¶¶ 18–22 (Ct. App. 2011) (defendant's 4-year-old son was found floating in family swimming pool and later died; defendant's attorney sent DCA 10-page letter detailing family history, son's health, details about incident, and investigation that differed from police report; subsequent e-mails specifically stated defendant would like to testify before grand jurors and further asked DCA to present exculpatory evidence contained in letter; DCA advised grand jurors only that defendant made written request to testify; court held DCA should have presented defendant's proposed evidence to grand jurors, and that error was not harmless because proposed testimony may have affected grand jurors' decision to indict).

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 21–29 (Ct. App. 2011) (defendant kicked victim while wearing tennis shoes; state alleged offense was dangerous because defendant used dangerous instrument, to wit, feet; court held tennis shoes could be considered dangerous instruments, but state would have to prove shoe caused greater injuries than foot alone would have caused, or that shoe was wielded as weapon, neither of which state proved, and because instructions and verdict forms were never amended to reflect that dangerous-nature allegation was based on use of tennis shoe, jurors never had to consider whether state had proved dangerous-nature allegation; thus court could not say error was harmless).

31.13.c.he.020 When a defendant **did** object at trial and thereby preserved an issue for appeal, if the appellate court concludes there was error, the court **will not reverse** if the state proves beyond a reasonable doubt the error did not contribute to or affect the verdict or sentence.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 23–24 (2011) (defendant asked trial court to instruct jurors they could consider other act evidence only to show identity; trial court instructed jurors they could consider that evidence to establish defendant's motive, opportunity, intent, preparation, plan, knowledge, and identity; court held trial court erred in not instructing on specific purpose for which other act evidence was admitted, but error was harmless because purpose for which evidence was admitted was apparent from record, and state urged jurors to consider that evidence only to show modus operandi, identity, and aberrant sexual propensity).

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 60–70 (2011) (state's amendment to notice of aggravating factors did not comply with statute or rule; court rejected defendant's contention that error was structural; because defendant had notice of evidence that would support aggravating factors and made no showing proper disclosure would have caused him to change litigation strategy, any error was harmless).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶ 32 (2011) (because of DNA evidence and circumstances of crime, any error in ordering defendant to wear leg brace was harmless).

State v. Vega, 228 Ariz. 24, 262 P.3d 628, ¶¶ 14–25 (Ct. App. 2011) (defendant charged with committing sexual crimes against his two nieces, ages 6 and 11; trial court admitted evidence defendant had improperly touched 11-year-old several months prior to charged incidents; court did not decide whether that evidence would have been admissible under Rule 404(b); court held it could have been admissible under Rule 404(c), but held trial court erred in not making analysis, and making findings, required by that rule, but held any error was harmless in light of evidence admitted to prove charged offenses).

State v. Vega, 228 Ariz. 24, 262 P.3d 628, ¶¶ 26–31 (Ct. App. 2011) (defendant was charged with committing sexual crimes against his two nieces, ages 6 and 11; defendant contended trial court erred in not allowing his daughter to testify as impeachment witness; it appeared daughter would testify her father never molested her, and that girls' mother wanted seek revenge against defendant in connection with prosecution of another family member; court held any error was harmless).

State v. Sprang, 227 Ariz. 10, 251 P.3d 389, ¶¶ 15–17 (Ct. App. 2011) (defendant was charged with first-degree murder; because two different methods of killing show planning or at least reflection, evidence showed killing would have been first-degree murder, thus trial court erred in giving instruction on second-degree murder over defendant's objection; court found error was not harmless).

Black v. Coker, 226 Ariz. 335, 247 P.3d 1005, ¶¶ 16–20 (Ct. App. 2011) (shortly after midnight, 12-year-old victim awoke to find person standing in her bedroom; victim recognized person as man who lived across street; at 4:22 p.m., defendant’s attorney faxed letter to county attorney’s office stating defendant wished to present testimony and other evidence to grand jurors; next day state presented case to grand jurors; DCA presenting case to grand jurors was not DCA named in letter sent by defendant’s attorney; DCA did not inform grand jurors of defendant’s request; court held that, even though letter did not provide any details about possible testimony, letter did make unequivocal request to appear and testify, thus state had duty to so inform grand jurors; court held error was harmless because court could not conceive of any testimony by defendant that would explain away contemplated charge, and because failure to inform grand jurors appeared to have been inadvertent).

Rule 31.13(c) Appellate briefs—Contents—Structural error.

31.13.c.se.010 The Arizona Supreme Court has described **structural error** as error that (1) deprived the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and error that (2) affected the entire conduct of the trial from beginning to end, and thus tainted the framework within which the trial proceeded; the Arizona Supreme Court has stated this test in the conjunctive in some cases and in the disjunctive in others.

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 66–68 (2011) (state’s amendment to notice of aggravating factors did not comply with statute of rule; court rejected defendant’s contention that error was structural).

31.13.c.se.030 If the defendant **did not** object at trial and the appellate court finds **structural error**, the court **will grant** relief without a showing of prejudice.

State v. Innes, ___ Ariz. ___, 260 P.3d 1110, ¶¶ 2–9 (Ct. App. 2011) (defendant’s attorney asked for bench trial, and state did not oppose request; on appeal, defendant moved to stay appeal and remand to determine whether defendant knowingly, voluntarily, and intelligently waived right to jury trial; on remand, trial court found there was not any formal discussion of waiver and no written waiver; court held it was structural error when record does not show defendant made knowing, voluntary, and intelligent waiver of right to jury trial).

Rule 31.13(c) Appellate briefs—Contents—Appellate review.

31.13.c.ar.050 Opening brief **on appeal** must present significant arguments, supported by authority, setting forth appellant’s position on issues raised, and failure to argue a claim usually constitutes abandonment and waiver of that claim.

State v. Cotton, 228 Ariz. 105, 263 P.3d 654, ¶ 4 n.3 (Ct. App. 2011) (defendant was charged with theft; defendant asserted on appeal trial court should have given “multiple acts instruction” *sua sponte*; court noted defendant did not request such instruction, which meant it would normally review for fundamental error only, but stated defendant failed to provide any authority or develop any argument, so court did not address issue).

State v. Rivera, 226 Ariz. 325, 247 P.3d 560, ¶ 10 n.4 (Ct. App. 2011) (defendant asserted in statement of facts that jury instruction for count 7 included endangerment of K.C., but verdict form was for endangerment of M.C., and there was no jury instruction on endangerment of M.C. because there was no evidence presented showing whereabouts of M.C. at time of shooting; because defendant cited to no evidence of this and presented no further argument contending what irregularity that may have caused, he waived any such argument).

State v. Rivera, 226 Ariz. 325, 247 P.3d 560, ¶ 10 n.3 (Ct. App. 2011) (to extent defendant claimed he suffered due process violation distinct from challenge to sufficiency of evidence, he did not provide sufficient argument or citation to any evidence, thus he waived any such argument).

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶ 11 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; defendant contended prejudicial effect of jurors watching someone kicking chair far outweighed any probative value; court noted defendant neither developed that argument nor presented additional authority to support that claim on appeal).

February 26, 2012

